Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-1649

JEROME S. MURRAY AND WILLIAM T. ALTHOFF,
Petitioners,

v.

ALEXANDER TITLE AGENCY, INC., AND
CHICAGO TITLE INSURANCE COMPANY,

and

JEROME S. MURRAY AND WILLIAM T. ALTHOFF,
Petitioners,

v.

CHARLES J. PILUSO,

PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

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OPINION BELOW

The memorandum opinion and judgments of the District of Columbia Court of Appeals were issued on January 21, 1979 (Appendix A, 1 *et seq.*). A petition for rehearing was denied on February 27, 1980 (Appendix B).

GROUNDS OF JURISDICTION

Jerome S. Murray and William T. Althoff petition for a Writ of Certiorari to review the judgment of the District of Columbia Court of Appeals entered in consolidated appeals numbered 14084 and 14197. A petition for rehearing *en banc* was denied by order filed February 27, 1980. Jurisdiction to review the Judgments on certiorari is conferred by Section 1257, 28 U.S.C.

QUESTIONS PRESENTED

Did the District of Columbia Court of Appeals, in Appeal number 14084, disregard a controlling decision of this Court, namely, *Citizens National Bank of Roswell, New Mexico v. Davisson*, 229 U.S. 212, in affirming the Judgment in favor of Alexander Title Agency, Inc. and Chicago Title Insurance Company?

Did the District of Columbia Court of Appeals, in Appeal numbered 14197, err in affirming the judgment of dismissal in favor of Charles J. Piluso, particularly after the trial court refused to allow plaintiff to call Piluso as a witness, on the ground that Piluso had not been listed as a witness at the time of pre-trial? Was not the refusal of the trial court a denial of due process?

STATEMENT

In the Superior Court of District of Columbia, the Petitioners instituted action against Royal National Bank of New York, Security National Bank (its successor by merger), Alexander Title Agency, Inc., Chicago Title Insurance Company, Louis J., Peter and Paul Pomponio, Charles J. Piluso and The Virginia Corporation. That action sounded in fraud, negligence, breach of contract and to compel subordination of a deed of trust.

A second action instituted by Petitioner Murray alone, against Alexander Title Agency, Inc., and Chicago Title Insurance Company, sounded in fraud and negligence. The two actions were consolidated.

In consequence of a settlement with the Virginia Corporation, the complaint was dismissed as against Virginia, Royal National Bank and Security National Bank. On April 8, 1978, petitioner Murray recovered judgment against the defendants Pomponio in the sum of $4,183,561.92.

From that point on, there were only three defendants left in the case, Alexander Title, Chicago and Piluso.

Chronologically, the first disposition was by summary judgment on October 12, 1978, of the cases against Alexander Title Agency and Chicago Title Insurance Company. The complaint against Piluso was dismissed at the close of plaintiff's case on November 13, 1978.

Adopting the chronology, the Petitioners will first address the actions against Alexander Title and Chicago Title and then, the action against the defendant Piluso which ended in an adverse judgment from which an appeal was taken.

REASONS FOR GRANTING THE WRIT

In Civil Action 8961-73 in the Superior Court, plaintiff Murray set out his complaint against Alexander and Chicago against the following background. The background is that The Virginia Corporation purchased Lot 38 in Square 457, District of Columbia from Mr. Murray on October 20, 1970, for $4,292,015.20, paying $750,000 in cash and executing a purchase money note and deed of trust, running to plaintiff Althoff in the amount of $3,534,800.

The deed of trust was not recorded, it is alleged, because the defendants Pomponio and Piluso, Virginia's negotiating officers, had falsely represented that a loan to be made to Virginia by Royal National Band would be made only if the property was clear of encumbrance, except for a deed of trust securing Royal. Murray accepted the $750,000 cash payment, it is alleged, not knowing that Royal had agreed to lend Virginia $2,700,000 to be used for the purchase of the Murray property.

The essence of the first action against those defendants—as explicitly stated at pre-trial—lies in their failure to disclose their knowledge of the $2,700,000 loan made for land acquisition purposes so that Mr. Murray would have had a chance to demand the difference between $750,000 and $2,700,000. Thereby, Murray could have prevented the diversion of the $1,950,000 difference to other enterprises controlled by the Pomponios and Piluso and reduced his losses on the $3,534,800 note which went into default leaving him with provable losses well in excess of $4,000,000.

The substance of Civil Action 10862-73 in the Superior Court is that Alexander and Chicago conducted settlement, on December 21, 1970, on a $9,975,000 Security National Bank loan to Virginia and, though aware of the outstanding land purchase indebtedness, they certified clear title to the lending institution as advances were made.

THE FACTS

Restating the complaints in summary, Murray's claim against the title companies is two-fold.

The first half is that the title companies, knowing that Murray had sold his land to The Virginia Corporation for $4,300,000 and knowing that a bank had made a $2,700,000 "land loan" to the purchaser, failed to disclose the facts within their knowledge, in consequence of which, Murray was denied the chance to lay claim to the entire land loan. Instead, he walked away from the settlement on the transaction with a relatively meager $750,000 cash payment which the Pomponios and their counsel Piluso had duped him into an agreement to accept.

The second half is that the title companies repeatedly certified title to a "construction loan" lender—the same bank—when it was perfectly obvious to them that each advance under a $9,975,000 "construction loan" would add to the lien load against the property and chip away at Murray's interest in the land, when disclosure of what they knew would have afforded him an opportunity to take action to protect his interests.

The opening question then becomes: How did the title companies come to know the facts?

Under date of October 17, 1970, Murray contracted to sell Lot 38, in Square 457 to The Virginia Corporation, a corporation controlled by the Pomponios and Piluso, for just under $4,300,000. By deed of October 20, 1970, the transfer of ownership was consummated. By the contract, Murray was to receive $750,000 in cash and take back a purchase money note for $3,534,800.

At settlement on the sale, Murray received the note. The defendants speak of the note as being unsecured but their own Exhibits used on the motion disclose that the credit part of the transaction was secured, *inter alia*, by a deed of trust delivered in escrow to William T. Althoff.

Prior to the settlement on the sale but on the same day, George Bennett, a lawyer in the employ of Alexander Title, had flown to New York City to close on the $2,700,000 loan made by Royal National Bank to The Virginia Corporation. At the New York meeting, at which Louis Pomponio and Charles Piluso were present, Bennett received The Virginia Corporation's deed of trust to secure the $2,700,000, running to Alexander Title Agency, as trustee, and a letter of instructions regarding recordation.

We do know that the loan had been in the mill for some time. By the testimony of John Underwood, on deposition, an officer of both title companies, Chicago issued a binder on October 13, 1970, to insure the lien of Royal in the amount of the loan. We do know that, on the same day, Chicago issued a binder to insure The Virginia Corporation, as owner, in the amount of $4,300,000. We do know, therefore, that Chicago was aware of a $1,600,000 spread between the purchase price of the land and the amount of the loan, and we do know that Alexander and Chicago knew The Virginia Corporation was a very young and probably a single asset corporation, having been organized in June, 1970; John Underwood, an officer of Alexander Title, was an incorporator. Underwood knew, according to his testimony on deposition, that The Virginia Corporation was "attempting to buy a piece of property in the District of Columbia" and "would take title in the name of The Virginia Corporation."

He knew, too, of the nature of the $2,700,000 loan, for, in 1974, he had testified to its nature at a criminal trial of the Pomponio brothers and Piluso.

Additionally, he was very clear that he received a "thank you note" from Piluso reading as follows:

October 26, 1970

John W. Underwood, Esquire
Alexander Title Agency, Inc.
2045 North 15th Street
Arlington, Virginia

Dear John:

I would be remiss if I did not drop you a line and let you know how pleased I was with the manner in which George Bennett handled the fee acquisition of The Virginia Corporation from Jerome S. Murray, *and the placing of the interim land loan between The Virginia Corporation and Royal National Bank of New York.*

In addition, George was a great help with the closing of the permanent loan between The Zachary Taylor Corporation and New York State Teachers' Retirement System. All in all, you picked a good week to be away and George suffered his "baptism of fire" in good stead and came through with flying colors.

Will you please extend to George my heartiest and sincere thanks.

Warmest personal regards,

Sincerely,

Charles J. Piluso

CJP/mg

[Emphasis added.]

Underwood stated the sequence quite clearly on deposition:

Q. And did you not conduct a settlement on the loan in New York?

A. Yes.

* * *

A. To define the word "settlement", we took the papers for recordation, yes.

Q. Well, you went to New York with the documents?

A. No, we went to New York and obtained the documents.

Q. I see, all right, and you took them back to Washington, and after some further proceedings at the office of District Realty Title Insurance Company, you recorded them?

A. That's correct.

Q. And you would issue the binder to the purchaser for four million three, you would issue the loan binder for two million seven, but you made no inquiry whatsoever about the disposition of funds?

* * *

THE WITNESS: No.

Q. But you did disburse an installment of $774,000, didn't you?

A. That's correct.

* * *

Q. Well, were any of these checks which Mr. Bennett transmitted, were they paid to or for the account of Jerome Murray?

A. Just about all of them were, with the exception of some fees that were charged. Monies went to pay off a prior mortgage of Murray, pay back taxes, pay a commission, and to pay Murray.

* * *

Q. Well, having settled on the $2,700,000 loan, you made no inquiry at all as to why more than this amount of $774,000 was not disbursed to or for the account of Murray?

A. No.

The lame excuse for the failure to inquire and disclose came in the answer to the next question. "We had a settlement sheet, District Realty settlement sheet, showing what Murray was to get."

The excuse was amplified a bit by the explanation that Piluso—the lawyer for the Pomponio organization for which Chicago Title had written fifty to seventy-five million dollars worth of title insurance—had said:

> He [Murray] was going to take so much cash and an unsecured note. We then received the settlement sheet for District Title that says he's going to get so much cash and an unsecured note, all agreed to by Mr. Murray. He took the cash. Why would I ask anybody any question?

Q. Isn't it unusual in your business for the seller of property to take an unsecured note?

A. It's pretty rare I would guess, yes.

Parenthetically, it might be well to set down the fact that the lending bank knew that the $2,700,000 loan was a "land advance." In February, 1974, interrogatories were propounded to the lending bank, after service on all parties, which the bank answered with little delay. Those pertinent to the Alexander-Chicago litigation are reproduced:

Interrogatory "1":

Did Defendant Royal National Bank make a loan of $2,700,000 to Defendant The Virginia Corporation on or about October 20, 1970, secured by deed of trust against Lot 38 Square 457, District of Columbia?

Answer:

The records of Royal indicate that the loan described in Interrogatory "1" was made.

Interrogatory "2":

Did the law firm of Stolz, Goldfine and Stolz, 529 Fifth Avenue, New York, New York, represent Royal National Bank, as counsel, in the above-mentioned loan transaction?

Answer:

The records of Royal indicate that it was represented by the law firm of Stolz, Goldfine and Stolz in said transaction.

Interrogatory "3":

Did Stolz, Goldfine and Stolz receive a letter from defendant Charles J. Piluso, dated October 19, 1970, with reference to defendant The Virginia Corporation, advising in part as follows:

> This is an interim loan (similar to Van Buren, Polk and Taylor) which will allow the Pomponios to acquire the property in anticipation of a permanent commitment which they expect to receive not later than November 15, 1970.

Answer:

The records of Royal contain a copy of said letter and, upon information and belief, it was received by Stolz, Goldfine and Stolz.

Interrogatory "9":

Did defendant Royal National Bank make an additional loan in the sum of $9,375,000 to The Virginia Corporation secured by deed of trust against the premises described in Interrogatory No. 1, on or about December 22, 1970?

Answer:

The records of Royal indicate that on December 21, 1970, Royal merged and consolidated the loan described

in Interrogatory "1" into a building loan in the amount of $12,675,000 secured by a consolidated deed of trust in like amount against the premises described in Interrogatory "1".

Interrogatory "16":

In said application mentioned in Interrogatory No. 15, did defendant The Virginia Corporation, state, under a heading "Non-Construction", that a previous application for a Land Advance in the amount of $2,700,000 had been made?

Answer:

The application in the files of Royal so states.

Interrogatory "20":

Did the sum of $4,227,175 include the Land Advance in the amount of $2,700,000?

Answer:

The application in the files of Royal so indicates.

Interrogatory "24":

Was such disbursement of the sum of $4,014,875 made for the following purposes in a category designated "Non-Construction" in the following several amounts:

Land Advance	$2,700,000
Legal Closing Costs	55,000
Estimating Cost	22,000
A & E Costs	510,000
Appraisal	15,000
Insurance	26,000
Building Permit	21,000
Points and Interest	289,875

Permanent Lender Fee	250,000
Placement Fee Broker	126,000

Answer:

The records of Royal so indicate.

Again in December, 1977, Chemical Bank, the ultimate successor to Royal, answered interrogatories, in shich the bank detailed and separated non-construction costs from construction costs. The former added up to $4,697,965, the latter aggregated $7,713,000.

And let there be no doubt that Underwood knew what "land loan" means. On deposition, he testified:

Q. What do you mean by land loan in the context of this case?

A. It might mean different things to different people but to me a land loan is a loan based upon the security of the land. In other words, the land is the security for the loan.

Q. So in other words, the Royal National Bank makes a mortgage of 2.7 million and, as security, it gets first mortgage on the land?

A. That's correct.

The foregoing is set off from the narrative to bring home the fact that the $2,700,000 loan was an independent transaction, merged two months later with a loan of $9,975,000 secured by deed of trust, subject to the provisions of a Building Loan Agreement, dated at that time. Alexander and Chicago did the title work and knew the facts. Murray did not.

Underwood summed up the situation on deposition in the following exchange.

Q. So that in this settlement, as you describe it, of October 20, 1970, the funds were disbursed from the escrow account of Alexander Title and the instruments were recorded by Alexander Title.

A. That's correct.

With its position as escrow party established initially, Chicago Title took on further responsibility. On thirty-five succeeding occasions Chicago insured the lender's first trust position as additional advances were made. Still there was no disclosure. As Underwood stated it:

Q. Did Alexander Title Agency or Chicago Title ever tell Mr. Murray or anyone associated with him of the amount of the mortgage loan which had been insured?

A. We never had any discussions with Mr. Murray about anyting, so I wouldn't think so.

Q. Well, you didn't. Am I correct on that?

A. No, I have never talked to him in my life.

Judge Hyde, in Superior Court, filed a memorandum disposing of the action against Alexander and Chicago on their motion for summary judgment. It is clear that he understood the nature of Murray's claim. He acknowledged:

> Chicago Title did not say anything to the plaintiff . . . about the nature of the loan the Pomponios had obtained in New York; that is a "land loan" secured by a deed of trust on the property.

Framing the question, he said:

> The question is, as put by the plaintiff in his brief, did the title company have an obligation to disclose to the plaintiff what it knew about the nature of the New York loan?

Additionally, Judge Hyde recognized:

> . . . an escrow agent has a fiduciary relationship with the other parties to the escrow agreement.

His point of departure was:

> However, in this case the court cannot see how the defendant Chicago Title Insurance Company was in any way alerted to the fact that the plaintiff would be concerned about the type of loan the Pomponios would obtain in New York.

Further:

> . . . it is impossible to see how the Chicago Title Insurance Company could have any knowledge . . . of what the plaintiff's intentions might be if he had been aware that the Pomponios could obtain a land loan in the amount of $2,700,000. Nor from the bare facts that were known by the Chicago Title Insurance Company at the time of their work in the case can it be said they had knowledge of any fact which would be in any way significant or harmful to the plaintiff."

All this totally ignores the fact that the title companies were told—erroneously—that the three and one-half million dollar note was unsecured. What seller in his right mind would not have raised a storm if he knew that a prior lien, three and a half times the amount of his cash payment, was being placed against his security, for money which the lender intended to be paid to him? The Petitioners say, as pointed out earlier, that they were informed Murray was to get $750,000 in cash and an unsecured note, so they asked no questions, yet they assent to the proposition that it is the general practice in real estate sales for a vendor who sells on credit to be secured. Knowing the facts, as they did, they should have asked questions; Murray's exposure could have been reduced by $1,950,000 and the disaster that followed would have been of lesser magnitude.

I.

CHICAGO TITLE INSURANCE COMPANY AND ALEXANDER TITLE AGENCY ARE LIABLE TO PETITIONER MURRAY FOR BREACH OF FIDUCIARY DUTY.

The principal legal question involved is: Does a title insurance company which undertakes escrow duties have an obligation to disclose facts within its knowledge to all parties concerned, to the end purpose that a party who might be injured by non-disclosure may take steps to protect himself?

The general law governing the duties of a party in such a position does not permit him to separate himself from the action and leave those primarily involved to guess and gamble that each is dealing honestly with the other. *Citizens National Bank of Roswell, New Mexico v. Davisson,* 229 U.S. 212; *Bardach v. Chain Bakers, Inc.,* 265 App. Div. 24 (N.Y.).

In *Citizens National Bank,* Davisson was a broker who had negotiated a contract for the sale of a ranch, owned by an estate. The contract stipulated that the sellers would give marketable title and, if a deficiency turned up, an opportunity given to perfect title. The contract and a deposit were left with an officer of Citizens who put the contract in an envelope and endorsed a memorandum on it to the effect that the check was to be held until a given date "when settlement is to be made".

At the given date the sellers had not perfected the title, but there was agreement that additional time would be allowed. During the period agreed upon, the purchaser apparently became disenchanted and demanded that the bank return his check. The bank complied and the broker and sellers sued for the amount of the deposit which the contracting parties had agreed upon as a

forfeiture. Recovery was allowed on the ground that the bank had neglected a duty it owed; its obligation was to review the contract and determine whether the facts justified the return of the deposit. The Court said (229 U.S. at p. 223):

> The endorsement upon the envelope was a mere memorandum, not containing any clear expression respecting the agreement of the parties, and evidently unintelligible unless read in connection with the contract of sale. Quite as manifestly the deposit had no reason for existence except in aid of that contract and as a protection to both contracting parties.
>
> The fact that no officer of the Bank read this contract or knew of its terms is of no avail to the Bank. By the very circumstances of the deposit it was put upon notice that it was assuming a duty that could not be fully understood or fairly performed without a knowledge of the contents of the contract; it had possession of that instrument, with full opportunity to examine it, except for its own negligence it would have known the terms thereof. To permit it now to set up its own ignorance as an excuse or justification of its conduct in violating the rights of one of the parties to the contract would be to permit it to take advantage of its own wrong.

In the *Bardach* case, the plaintiff, who was represented by counsel, entered into a contract to purchase a bakery business. One Sherman, the seller's attorney, served as escrowee for cash deposits. Among other derelictions, Sherman withheld from the purchaser a good deal of knowledge that he had concerning the business background of the sellers and knowingly notarized his client's false affidavit which was delivered as one of the Bulk Sales Law formalities. The Appellate Division of the

Supreme Court of New York held Sherman liable for the purchaser's losses, saying (265 App. Div. at p. 27):

> Much more could be written showing the misconduct of defendant Sherman as escrow holder. Such a relationship is that of a fiduciary and Sherman owed the plaintiff the highest kind of loyalty. He was under a duty to disclose the situation which had come to his notice. He not only failed to disclose it and was silent when he knew the plaintiff was being defrauded, but by his conduct he actively aided the prosecution of the fraud both in what he said to the plaintiff and in disposing of the escrow moneys so as to prevent other people from drawing the plaintiff's attention to the situation.

In the "title company" cases, there is full recognition that these escrowees are fiduciaries of the parties. *Amen v. Merced County Title Company*, Sup. Ct. of Cal., 375 P.2d 33, 25 Cal. Rptr. 65; *Spaziani v. Miller*, Dist. Ct. of Appeal (Cal.), 4th Dist., 30 Cal. Rptr. 658; *Ruth v. Lytton Svgs. & Loan Assn.*, Dist. Ct. of Appeal (Cal.), 1st Dist., 72 Cal. Rptr. 521; *Diaz v. United California Bank*, Dist. Ct. of Appeal (Cal.), 2d Dist., 139 Cal. Rptr. 325; *Chilton v. Pioneer National Title Ins. Co.*, Ct. of Civil Appeals of Texas, 554 S.W.2d 246.

In the *Amen* case, the title company was the closer on a tavern contract. With a warning that a tax clearance certificate was essential to clear the purchaser of responsibility for sales taxes, the title company never informed the purchaser of its knowledge so that inquiry could be made and liability discharged out of a cash deposit put up by the purchaser.

The underlying principle (though set in a statute of limitations context) is explained (25 Cal. Rptr. at pp. 68, 69):

> Cases in which the defendant stands in a fiduciary relationship to the plaintiff are frequently treated as if they involved fraudulent concealment of the cause of action by the defendant. The theory is that although the defendant makes no active misrepresentation, this element "is supplied by an affirmative obligation to make full disclosure, and the non-disclosure itself is 'fraud'." [Citing authorities.] There is no need to resort to this fiction, however, for the very existence of a fiduciary relationship obviated the necessity of plaintiff's pleading fraud. [Citing authorities.] If, as plaintiff alleged, defendant breached its fiduciary duty to disclose her potential liability for the unpaid sales taxes, it would be manifestly unjust to hold that her action was barred by the statute of limitations when her failure to file a timely complaint resulted from that breach.

Spaziani draws on the principle of the *Amen* case. There, the seller of real property agreed to take back a purchase money note and deed of trust, subject to a first trust construction loan. Concededly there was some ambiguity in the escrow instructions. In fact, and the evidence showed the title company knew it, the first trust loan was made to assist in the purchase of the property.

Holding the title company liable for "closing the escrow" without disclosing what it knew, the court said (30 Cal. Rptr. at p. 667):

> [T]here was evidence from which the trial court could have found that the escrow holder proceeded to effect a transfer of the plaintiff's title to Ben Miller without determining her intentions with respect to the terms of the first deed of trust to be placed aagainst that property . . . . [Citing the *Davisson* case, *supra.*]

> There also was evidence which would have supported a finding that the escrow holder knew that it was plaintiff's intention that the loan to be secured by the first deed of trust was to be a construction loan; . . . and that the escrow holder proceeded to close the escrow without communicating the same to the plaintiff.
>
> The obligation of an escrow holder to disclose to his principal information acquired by him in the course of his employment must be viewed in the light of the fiduciary relationship existing between them. [Citing *Amen v. Merced, supra.*]

The sellers of real estate, in *Ruth v. Lytton,* had agreed to subordinate a purchase money deed of trust to "construction and/or take out" loans at an interest rate with a ceiling on them and in a principal amount not to exceed two-thirds of the appraised value of the property and improvements to be constructed. The loan made to the purchaser provided for an interest rate in excess of the ceiling in the event of default, the amount exceeded the maximum to which the sellers had agreed to subordinate and it reimbursed the purchaser for the down payment on the land.

The title company's liability was grounded in its failure to disclose the facts it knew to the sellers.

Following and quoting *Spaziani, supra,* the Court restated the rule that the escrow holder "bears a fiduciary relationship to each of them . . . ; and owes an obligation to each measured by an application of the ordinary principles of agency" (72 Cal. Rptr. at p. 527):

> A loan for a down payment on real property is most clearly not a "construction loan". This self evident proposition received judicial confirmation in *Radunich v. Basso,* 235 Cal. App. 2d 826, 834, 45 Cal. Rptr. 824, 830, where the court said:

> "There is a great deal of difference between a loan to obtain money to be used to improve the land or for construction thereon, which improvement or construction would enhance the value of plaintiff's security, and a loan for money to pay the purchase down payment."

In the *Diaz* case, the escrow holder, in this instance a bank, closed a transaction though advised that there was an error in the original instructions. Again, the rule of the *Spaziani* case was invoked and the opinion quoted from at great length and the escrowee was held to be chargeable with responsibility for losses sustained.

The *Pioneer Title Company* case is another in the line holding that there is a responsibility to disclose the facts at hand to the parties in the transaction. There, the aggrieved parties paid a builder $10,000 as a deposit on a house under construction. The builder cashed the checks, instead of depositing them with the title company along with the contract and substituted his own worthless checks. By agreement with the builder, the title company "held" his checks instead of depositing them to the credit of the escrow account. On appeal from a directed verdict in favor of the title company, the court held (554 S.W.2d at pp. 248, 249):

> Under the authorities cited we think there was evidence from which a jury could find that *Pioneer* was in escrow or stakeholder relationship with plaintiffs and Bentwood, and that *Pioneer* had breached such escrow and/or stakeholder contract as well as breached an express or implied trust.
>
> We further think the evidence raises fact questions as to negligence by *Pioneer* in not cashing Bentwood's checks and in not advising plaintiffs that such checks were not cashed; and that *Pioneer* did owe a duty to plaintiffs.

Starting in December, 1970, when Royal National Bank made the $9,975,000 construction loan, Chicago

Title certified clear title to the lender on thirty-five successive occasions. It had to know that Murray's position was becoming more and more submerged but, nevertheless, gave him no warning. Perhaps the title companies knew nothing of the diversion of funds complained of and for which a judgment of $4,100,000 plus has been recovered against the Pomponios. Had the plaintiff been informed of the fact of advances under the new loan by these defendants, his losses would not have been what they turned out to be.

The lead case which governed disposition in the court below was this Court's decision in *Citizens National Bank v. Davisson, supra. Citizens* was totally disregarded. The writ should be granted.

THE PILUSO CASE

About three and one half weeks after the dismissal of the action against the title companies, the case against the defendant Piluso was tried to Judge Hyde in Superior Court. The complaint against Piluso is embodied in two claims in the complaint.

In the first claim, it is alleged that plaintiff Murray sold Lot 38 in Square 457 to The Virginia Corporation at a price of $4,292,015.20. At the time of the sale, Mr. Murray received $750,000.00 in cash and accepted a promissory note in the amount of $3,534,800.00, with interest at 7% per annum, secured by a deed of trust.

By collateral agreement, Murray withheld recordation of the deed of trust by reason of the representations of the defendants Pomponio and Piluso that a loan to be made by a lending institution would be made only if the property were unencumbered. The fact of the matter was, as Murray later discovered, Royal National Bank had agreed to make a land loan in the amount of $2,700,000.00 which should have been applied on the purchase price.

During trial, after extended argument, the Trial Judge allowed an amendment to the complaint to add the following allegations:

> The defendants Pomponio and Piluso were officers and directors of The Virginia Corporation and they conducted the negotiations with Murray; representations were made to Murray that the Royal National Bank which was to make a loan for the construction of an office building would not permit the encumbrances of the property by a junior lien and The Virginia Corporation would be required to purchase the land from its own resources or the resources of the individual defendants.

The gist of the grievance was: The amount above the $750,000 which Murray received was diverted by the defendants Pomponio and Piluso to themselves and to other corporations which they controlled.

The second of the two claims is an extension of the first. Subsequent loans were made by Royal and its successor, Security National Bank, to The Virginia Corporation but these, too, it is alleged, were diverted, thereby impairing Murray's security, since they represented an additional load against the property with no corresponding reduction in the indebtedness owed to him.

THE FACTS

Murray first became acquainted with Piluso in the summer of 1970 relative to the purchase of the former's property at 6th and D Streets, N.W., in Washington. In the beginning, Murray, the Pomponios and Piluso discussed the possibility of a lease of the land.

The lease concept was abandoned and an outright sale contract was executed. The negotiations were concluded

at a dinner meeting at the Mayflower Hotel, those present being Murray, his son-in-law, his two sons and Piluso and Louis Pomponio.

The key point of the discussion was the outright representation of Pomponio and Piluso that their lending bank would not make a loan for the purchase of the land. Murray was told: ". . . they would have to pay for it out of their own pocket . . . ."

The discussion then centered on the amount of cash to be paid on account of the price. The first offer was $500,000 and "I [Murray] refused that, I wanted a million and they came back and offered seven hundred and fifty thousand."

Settlement on the sale was conducted at the office of the District Realty Title Insurance Company, late in the evening of October 20, 1970 and Murray executed a deed to the property. In exchange, Murray received the $3,534,800 note, pledge agreements under which the shares of stock of the three Pomponio brothers in The Virginia Corporation and Zachary Taylor Corporation were put up as collateral to secure the debt, the $3,534,800 deed of trust and an escrow letter addressed to Althoff.

On October 20, 1970, Murray knew nothing of the $2,700,000 loan from Royal Bank. That item he discovered in 1972 and even then he did not know it was a land loan. Concurrently, he found the $9,975,000 construction loan and another $2,000,000 second trust.

Early in 1973, an action was instituted in the United States District Court for the District of Columbia, the details of which are not material here, except to say that The Virginia Corporation, the three Pomponios and

Piluso were all named as defendants. In connection with that action, Mr. Cole, counsel for the defendants, turned over records of The Virginia Corporation and the records of a partnership.

The documents released consisted, first of all, of cancelled checks of The Virginia Corporation, drawn on Royal National Bank. These were examined by Murray and, after they were Xeroxed, the photoed copies were checked against the original instruments for identity.

The revelation of the nature of the $2,700,000 loan came in the summer of 1973, at Mr. Cole's office; it was a land loan. Murray's testimony was:

Q. And prior to that time, had you any knowledge that any money had been advanced to The Virginia Corporation as early as October, 1970, by Royal Bank?

A. No, I did not.

Q. Had you ever heard that the Pomponios were negotiating for anything other than a construction loan?

A. No, I did not.

Backing and filling for a moment, there was no reason for Murray to suspect that The Virginia Corporation had received any advances prior to the date of the construction loan, in December, 1970, as, following the sale, by agreement, Murray continued to operate a parking lot on the property.

The Trial Judge sustained an objection to the question whether Murray would have accepted the purchase money note in October, 1970, had he known of the $2,700,000 loan, on the ground that "It's both conjectural and hindsight and self-serving and a few other things."

The course of things after October 20, 1970, with reference to the Murray note of $3,534,800 was not ideal. The ten year note went into default in November, 1972, with a balance owing of $3,434,292.38. With a payment in January, 1973, the balance was reduced to $3,402,757.76. With interest added to the date of trial, the amount due was $4,823,160.44.

In April, 1975, Murray settled his claim against The Virginia Corporation, taking a $1,700,000 note and deed of trust secured against the property of The Virginia Corporation.

Conceding that the above mentioned note and deed of trust represent salvage, the plaintiff brought in expert testimony to put a valuation on the note as of the day of trial. The Pomponios and Piluso had resigned as officers and directors of The Virginia Corporation in June, 1972 and the new management settled the claim against Virginia.

The expert had examined the note and deed of trust, noted that there was no amortization during its eighteen year life, noted that the interest rate averaged two percent over the term and, upon advice that it stood second in lien position behind $16,000,000 in permanent financing securing John Hancock Life Insurance Company, gave it a "generous valuation of $500,000". This, we agree, would be a credit on any judgment recovered against Piluso.

Over and above the testimony of Murray in relation to the misrepresentations made by Piluso, proof of misrepresentation lies in a Piluso deposition, much of which was read into the record at the trial.

Piluso became house counsel for the Pomponio organization in 1965. The Pomponio empire, his testimony

was, consisted of approximately fifty business corporations. Among them were:

Abbingdon Realty Corporation
Art Electric, Inc.
Commonwealth Parking Corporation
Federal Realty and Development Corporation
James Buchanan Corporation
James K. Polk Corporation
Martin Van Buren Corporation
Millard Fillmore Corporation
National Center Corporation
National Realty and Construction Corporation
Rosslyn Development Corporation
Zachary Taylor Corporation

All or most of them were real estate owning corporations, with Piluso the counsel representing the purchasers. His work was the link with Alexander and Chicago Title.

The Virginia Corporation was organized at his direction under the corporation law of the District of Columbia. Some two months later, Piluso met Murray and the original lease proposal was discussed but the shift was made to the sale agreement which Piluso prepared. The purchaser did not have the money to pay for the land and the source was the loans from Royal National Bank, the first of which was for $2,700,000.

Under date of October 13, 1970, Chicago Title issued the lender's $2,700,000 mortgage binder and the purchaser's binder for $4,300,000. The sale was settled on at "District Title" in Washington.

On October 10, 1970, Piluso wrote to counsel for Royal Bank advising counsel that the $2,700,000 loan

> is an interim land loan similar to Van Buren, Polk and Taylor which will allow the Pomponios to acquire the property in anticipation of a permanent commitment which they expect to receive not later than November 15, 1970.

On October 26, 1970, Piluso wrote his letter of thanks to John Underwood for the fine performance of Mr. Bennett, which the Trial Judge derided somewhat but which he considered supportive of the plaintiff's position that because the first New York bank loan was not applied in its entirety to the land contract price that Murray was defrauded.

Piluso was evasive in his testimony on deposition about the purpose of the first $2,700,000 loan, referring to it as the first "stage" and finally dodging the entire question with the familiar "I think the letter speaks for itself". He did say that the title companies were familiar with the "stage" concept but again avoided the import of his letter of October 26th by saying "it was a poor choice of words".

On December 14, 1970, Piluso again wrote to counsel for Royal National, referring to the prior "land loan" and advising that all was in readiness for the closing of the second loan of $9,975,000, in which transaction the first and second loans were consolidated to create a single first trust lien.

Plaintiffs' counsel sought to establish that Piluso was more than "house counsel" and Assistant Secretary of The Virginia Corporation. The purpose was to establish that he was an integral part of management. The Trial Judge recognized counsel's intentions, saying:

> So far I have admitted this evidence for one purpose only, and it's so cumulative it's commencing to wear me down like a pack horse, that Piluso had

strong connections with Virginia Corporation and strong managerial responsibilities, that he often did and was permitted to act as a managing agent of the corporation when it suited the purposes of the officers and directors of the corporation.

The next day the Trial Judge made a finding that left counsel with no doubt about the Court's views on the point:

THE COURT: Oh, my heavens, Mr. Dooley, if there is one thing you have established so far, sir, so help me, Heaven, I will go on the record, is that Mr. Piluso was an active manager of the affairs of The Virginia Corporation. He was assistant secretary and active [*sic*] took part in the operation of its affairs, and in giving it advice. That has been made abundantly clear. I don't know how much you are to accumulate evidence on the subject.

MR. DOOLEY: Well, until this moment, I didn't know that Your Honor felt that way. And so maybe I can abbreviate this.

THE COURT: If I didn't make that clear yesterday I went through a horrible dream or something in the last 48 hours. I thought I had made that clear. I have been fussing about the cumulative nature of these documents.

MR. DOOLEY: I know it.

THE COURT: For hours now.

MR. DOOLEY: I know it. But I didn't know that Your Honor was in accord with my position.

The cap on the point lies in the fact that Piluso owned twenty shares of The Virginia Corporation in October, 1970 and that he resigned as a director on June 30, 1972.

The Trial Judge's ruling, and the last two exhibits put the blast on Piluso's claim that he was never any more

than an Assistant Secretary of Virginia—a high sounding term for Chief Clerk. He was as deeply involved as the Pomponios, a truth that destroys his denial of all responsibility for Murray's misfortune.

Just how Piluso could deny that the first loan was for land acquisition is a mystery. Added to the incriminating effect of his own letters were the interrogatories propounded to the Banks. Counsel undertook to read certain of the interrogatories and their answers into the trial record.

Briefly, the interrogatories and their answers—which had been served on Piluso's counsel—demonstrated (1) that the $2,700,000 loan was made by Royal to Virginia, (2) that the lender's counsel was informed by Piluso that the loan was for the purpose of allowing the Pomponios to acquire the property, (3) that the loan was disbursed by credit to Virginia's account at Royal, (4) that on December 21, 1970, the first and second loans were consolidated, (5) that a land advance of $2,700,000 had been made, (6) that Virginia had acknowledged receipt of it.

Following some argument, the Trial Judge excluded the interrogatories, apparently on the theory that the testimony was not binding on Piluso. The short answer is that Piluso through his counsel had an opportunity to cross examine by cross-interrogatory and the situation was no different from what it would have been if the deponent had been in court or deposed on deposition after notice.

After the Trial Judge allowed the amendment to the complaint, to flesh out the allegation of fraud, counsel asked for reconsideration of the ruling on the interrogatories. After argument the Court adhered to the earlier ruling.

The second claim against Piluso sets out the cause of action against him for diversion of corporate funds. The basic allegations are that funds provided by Royal National Bank—and its successor, Security—for land acquisition and construction, were diverted from The Virginia Corporation to other corporations in the Pomponio combine.

The whole point of the claim was stated by counsel on argument to the court, preparatory to putting in the proof of diversion:

> . . . if he [Piluso] was a mainspring operator, then he, number one, had no business diverting these funds to corporations in which he had an interest as a stockholder. And two, even if he didn't have an interest in the corporations as a stockholder, he had no business permitting the rest of the Pomponios to do the same thing.

At an earlier point, *infra*, a number of the corporations in the Pomponio cluster was listed. Of those listed, Piluso was a stockholder as well as an officer in the following named and to these the following several sums were diverted from The Virginia Corporation's account between October 20, 1970, and December 31, 1971:

Abbingdon Realty Corporation	$ 29,000
Art Electric, Inc.	78,005
Commonwealth Parking Corporation	164,005
Federal Realty and Development Corporation	500
James Buchanan Corporation	731,600
Buchanan Apartment Associates (Buchanan Corp. was its title holding nominee)	131,000
James K. Polk Corporation	501,700
Martin Van Buren Corporation	106,900

Millard Fillmore Corporation	260,000
Rosslyn Development Corporation	1,500
	$2,004,210
To Charles Piluso, personally	27,950
	$2,031,160

In the following named, of the remaining corporations, Piluso, according to his testimony on deposition, held the office of Assistant Secretary. To these corporations, the following several sums were paid out to The Virginia Corporation's account:

National Realty & Construction Corp.	$6,320,137.35
National Center Corporation	440,116.00
Zachary Taylor Corporation	351,000.00
	$7,111,253.35

The record establishes that National Realty and Construction Corporation was the contract builder on the property sold by Murray and approximately $6,300,000 was paid to that entity between October 20, 1970 and December 31, 1971. Perhaps much of that sum actually went into construction but the record shows that National was the recipient of $450,000 in the ten days following October 20, 1970. That sum certainly was not expended on construction, as the plaintiff, by agreement, continued to operate a parking lot on the property until December, 1970.

In addition to the disbursements heretofore listed, other payments of $227,010, $2,228,646, $217,000 and $429,006.50 were made to Rosslyn Construction Company, Pomponio Brothers Realty and Construction Co., Columbia Plaza Corporation, and Pomponio Financial Corporation, respectively, all components of the Pomponio group, and unrelated to The Virginia Corporation.

At a time when The Virginia Corporation had no income, because the Patrick Henry Building had not been built, Internal Revenue Service was paid $72,248.68 and another $267,754.55 was disbursed to the Arlington County Treasurer. The Virginia Corporation holds a District of Columbia charter and was organized for the purpose of constructing a building at the corner of 6th and D Streets, N.W. There could be no earthly reason for any such payment to the Treasurer of Arlington County.

The last six diversions aggregate $3,491,665.73.

The massive outlay totals $12,634,079.08. Assuming the propriety of payments to National Realty and Construction of $5,870,137.35 ($6,320,137.35 less the first $450,000) the amount diverted comes to $6,763,941.73.

The specifics of the proof of diversion derives from the testimony of H. Burton Bates, a certified public accountant for the Pomponio organization. Mr. Bates' deposition was taken on January 12, 1978, pursuant to a commission issued by Judge Revercomb of Superior Court.

Bates' testimony was that the Pomponios had structured their business so that "each building rested within an owning corporation." Other corporations supplied the administrative and support functions. Specifically, he named the following corporations and their functions:

Rosslyn Construction Company—construction and labor relations

Pomponio Brothers Realty and Construction Company—leasing and rental

Columbia Plaza Corporation—owner of a building in Columbia Plaza

Abbingdon Realty Corporation—owner of a building at 1800 N. Kent Street, Arlington, Virginia

National Center Corporation—acquired land on Jefferson Davis Highway

A & H Plumbing Supply Corporation—owned by Louis Pomponio, Sr.

Atlantic Mechanical Corporation—plumbing and heating contractor

Art Electric Corporation—electrical contractor

Pomponio Financial Corporation—Administration

Commonwealth Parking Corporation—rental of parking spaces

Rosslyn Development Corporation—construction of Pomponio Plaza on Moore Street, Arlington, Virginia

Buchanan Apartment Associates—construction and rental of apartments on Jefferson Davis Highway. "Outside Owners" entered the partnership between 1969 and 1971

Federal Realty and Development Corporation—developer of Rosslyn Commonwealth Building, Wilson Boulevard, Arlington, Va.

Martin Van Buren Corporation, James Polk Corporation, Millard Fillmore Corporation

The Virginia Corporation (the genesis of this action)—The Patrick Henry Building at 6th and D Streets, N.W., Washington, D.C.

Royal National Bank was one of the lenders which provided funds for the Pomponio operations. Mr. Bates identified the statements and checks as those of The Virginia Corporation, running from the end of October, 1970, through December 31, 1971.

Item by item Mr. Bates, who was familiar with the account, testified to checks drawn or to wire transfers.

At the close of his testimony with respect to the several items, Mr. Bates testified to a corresponding debit item on the monthly statement.

In ruling on the motion to dismiss at the close of plaintiff's case, Judge Hyde said

> The only proof you have of any divergence, wrongful divergence for which this defendant would be personally responsible, were the disbursement of this money from these New York banks to corporations owned and operated by the Pomponios, and Mr. Piluso. But you can't decide a case on mere conjecture and suspicion.

The Trial Judge's statement overlooks a central point. Counsel pointed out on argument of the motion that by the Consolidation Agreement of December 21, 1970, The Virginia Corporation agreed

> . . . to receive the advance or advances secured by the said two (2) Deeds of Trust as hereby consolidated, extended and modified, as a trust fund to be applied to the financing and construction of the improvements contemplated by the said Building Loan Agreement.

The record shows that the first $2,700,000 disbursed—apart from the $750,000 plus payment to Murray—went in several different directions within ten days. Over the next fourteen months, the pattern was the same.

At an early stage in the proof of diversion, the Trial Judge, indicated strong reservations about the *prima facie* worth of the checks as proof of diversion but he relented to the extent of admitting the evidence for the purpose of making a record.

Anticipating that the Court would ultimately reject the plaintiffs' argument that the checks themselves made out a *prima facie* case of diversion—and the petitioners

do not recede from that position here—Mr. Piluso was called, for the purpose of expanding the evidence. The general questions would have been: How were the funds from the bank used? Why were they shuffled from Virginia's account to other corporations?

Objection was made on the ground that Piluso had not been named as a witness in the pre-trial statement filed months earlier.

Plaintiffs' counsel was told the "Rule" foreclosed him. The answer is that there is no such rule. Rule 16(4) of the Superior Court Civil Rules does provide for limiting the number of expert witnesses but it does not say that a party who believes, during trial, that his case may be strengthened by the testimony of an additional witness may not so aid his cause.

I.

PETITIONER MADE OUT A *PRIMA FACIE* CASE OF FRAUD AGAINST DEFENDANT PILUSO.

In a Finding of Fact the Trial Court agreed that the Pomponios and Piluso represented to Murray that cash for the down payment on the land had to come out of the defendants' pocket. The falsehood was overwhelmingly demonstrated. The lie, however, said the Trial Court in a Conclusion of Law "has no merit in constructing proof of fraud in a legal sense."

The thought that there was no materiality in the representation concerning the availability of cash and the nondisclosure of the land loan about to be made is thoroughly rejected in the American Law Institute's recently published 2nd Edition of the Restatement of Torts. Section 551 reads as follows:

> (1) One who fails to disclose to another a fact that he knows may justifiably induce the other to act

or refrain from acting in a business transaction is subject to the same liability to the other as though he had represented the nonexistence of the matter that he has failed to disclose, if, but only if, he is under a duty to the other to exercise reasonable care to disclose the matter in question.

(2) One party to a business transaction is under a duty to exercise reasonable care to disclose to the other before the transaction is consummated,

(a) matters known to him that the other is entitled to know because of a fiduciary or other similar relation of trust and confidence between them; and

(b) matters known to him that he knows to be necessary to prevent his partial or ambiguous statement of the facts from being misleading; and

(c) subsequently acquired information that he knows will make untrue or misleading a previous representation that when made was true or believed to be so; and

(d) the falsity of a representation not made with the expectation that it would be acted upon, if he subsequently learns that the other is about to act in reliance upon it in a transaction with him; and

(e) facts basic to the transaction, if he knows that the other is about to enter into it under a mistake as to them, and that the other, because of the relationship between them, the customs of the trade or other objective circumstances, would reasonably expect a disclosure of those facts.

The only argument that can be made against this statement of the law is that it represents an upgrading of the morals of the market place. It is, however, wholesome doctrine which governs the case.

II.

PETITIONERS MADE OUT A *PRIMA FACIE* CASE OF DIVERSION OF FUNDS AND THE TRIAL COURT DENIED DUE PROCESS IN REFUSING PETITIONERS THE RIGHT TO CALL PILUSO AS A WITNESS.

Just what may and may not be done by a borrower, with funds advanced by a senior lienholder is illustated in *Ban-Co. Inv. v. Loveless* (Ct. of Appeals of Washington, 587 P.2d 567 (1978).

There, a shopping center developer mortgaged property to an institutional lender for $665,000 and certified that all funds had been used for improvements. In fact, close to one-sixth of the money loaned had been used for pre-payment of rent, overhead and a profit for the developer.

The junior lienholder who had sold the property to the developer and who had taken back a purchase money mortgage with a provision for subordination to the institutional loan sought recovery of the diverted monies.

The Washington Court, following and quoting from *Miller v. Citizens Savings and Loan Assn.*, 248 Cal. App. 2d 655, 56 Cal. Rptr. 844, 850-51, allowed recovery of the diversions, adopting the principle as stated in *Miller:*

> While it may not be impossible that a vendor has agreed to subordinate his purchase money lien to a lien secured by the purchaser to be used for purposes entirely apart from the mutual enterprise, such an arrangement would be so unusual and so unlikely that we would require it to be spelled out with particularity. Typically the loan proceeds are to be used for purposes which will either enhance the vendor's equity in case he must foreclose his lien or will provide funds from which he will be paid.

A subordination agreement should be construed, unless it expressly provides otherwise, as permitting the loan proceeds to be used only for such purposes.

When Virginia accepted Royal's funds as a trust fund, it put itself in a straight-jacket and when a showing was made that its managers moved the funds around as they pleased, the very least required of Piluso was a duty to go forward with the evidence on the issue of legitimacy of use. When the Trial Judge denied the petitioner the opportunity to call Piluso to add to the proof already made, there was a plain denial of due process.

This case rests upon the rule of liability of corporate officials for wrongs done to a creditor who suffers an identifiable loss peculiar and personal to himself, by reason of fraud or negligent mismanagement of the corporation's business. In such cases, the creditor has a claim for his personal loss which inures to him personally. *Ford Motor Credit Company v. Minges,* C.A. 4, 473 F.2d 918 (1973).

CONCLUSION

The Petition for Certiorari should be granted.

Respectfully submitted,

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Attorney for Petitioners

Appendix

APPENDIX A

DISTRICT OF COLUMBIA COURT OF APPEALS

[Filed: Jan. 21, 1980]

No. 14084

JEROME S. MURRAY, *et al.*,
Appellants,

v.

ALEXANDER TITLE AGENCY, INC., *et al.*,
Appellees.

No. 14197

JEROME S. MURRAY, *et al.*,
Appellants,

v.

ROYAL NATIONAL BANK, *et al.*,
Appellees.

APPEAL FROM THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
(Hon. DeWitt S. Hyde, Trial Judge)

(Argued: December 20, 1979)
(Decided: January 21, 1980)

Before: Nebeker, Harris, and Pryor, Associate Judges.

MEMORANDUM OPINION AND JUDGMENT

Appellants Jerome S. Murray and William T. Althoff brought suit[1] to recover for alleged fraudulent and negligent acts in connection with Murray's sale of real estate located in the District of Columbia (C.A. No. 8961-73, Oct. 24, 1973). This action was consolidated with another suit arising out of the same transaction, which appellants filed against Chicago Title Co. (C.A. No. 10862-73, Dec. 27, 1973). The Title Company filed a Motion for Summary Judgment and was granted the same. Thereafter, in a non-jury trial, the trial court dismissed the claim against Piluso at the conclusion of plaintiff's evidence pursuant to Super. Ct. Civ. R. 41(b). From these judgments, appellants appeal. This court

[1] Originally named as defendants were:

(1) The Virginia Corporation, (The Corporation) purchaser of the property;

(2) Louis J. Pomponio, Jr., Peter Pomponio and Paul Pomponio (the Pomponios), officers and stockholders of the Virginia Corporation at the time it purchased the property;

(3) Charles J. Piluso, legal counsel to the Pomponios and the Virginia Corporation;

(4) Royal National Bank and its successor, Security National Bank (collectively, the Bank), which made a loan to Virginia Corporation secured by a deed of trust on the property;

(5) Chicago Title Insurance Co. and its agent, Alexander Title Agency, Inc. (collectively, the Title Company), which issued a mortgage title insurance policy to the Bank insuring its interest to first mortgagee of the property.

Plaintiffs settled their claims against Virginia Corporation and the Bank prior to trial, and received a default judgment against the Pomponios. The remaining defendants were the Title Company and Charles Piluso.

is asked to consider: (1) whether the trial court erred in granting summary judgment in favor of the Title Company; and (2) whether the trial court erred by dismissing the complaint at the close of appellants' case in chief. Finding that the trial court committed no error, we affirm.

The following facts, which are materially undisputed, appear as a matter of record:

On October 20, 1970, the Virginia Corporation entered into an agreement to purchase real estate located in the District of Columbia, from appellant Murray, an experienced real estate investor, who had bought and sold real estate with some frequency since the 1930's.[2] The real estate was to be used for commercial purposes. The sale price was $4,284,800.00. At the sale closing Murray received from the Corporation the equivalent of $750,000.00 cash. In addition, the Corporation executed and delivered a deferred purchase money note, payable to the order of Murray in the amount of $3,534,800.00. To secure payment of the deferred purchase money note, the Corporation executed and delivered to Appellant Althoff, Murray's counsel and son-in-law, a deed of t ust against the land. By agreement, the deed of trust was withheld from recordation, upon the representations of Pomponio and appellee Piluso (Virginia Corporation's negotiating officials) that Royal National Bank, the lending institution which agreed to fund the project required that the premises be free and clear of encumbrance except for a deed of trust securing the Bank. To evidence this agreement, the settlement sheet carried the legend "unsecured," in a

[2] Finding of Fact #13, R. 279.

note opposite the line describing Murray's purchase money note. The legend was underlined.

The Virginia Corporation financed the $750,000.00 downpayment with part of the proceeds of a $2,700,000.00 mortgage loan, procured from Royal National Bank earlier on the day of the closing. Appellee Alexander Title Agency, Inc., as agent and duly authorized representative of the Chicago Title Insurance Company, conducted settlement on the loan. As a prerequisite to procuring the loan, the Virginia Corporation got the Title Company to provide the Bank with a commitment to issue a mortgage title insurance policy. The Title Company also co-insured an owner's title policy in favor of the Virginia Title Corporation. To secure payment of the loan, the Virginia Corporation executed and delivered to the Title Company, a deed of trust against the land, in favor of the Bank. As per instruction, the day following the sale closing, the Title Company recorded the deed from Murray to the Virginia Corporation, and immediately thereafter, recorded the deed of trust from the Virginia Corporation in favor of the Bank. This deed constituted the first lien on the property.

Once the deed from Murray to the Virginia Corporation, and the deed of trust from the Virginia Corporation in favor of the Bank, were recorded, Title Company notified the Bank, which immediately wired the $750,000.00 down payment to the Title Company's escrow account. The Title Company then disbursed the money to Murray in accordance with previous agreement, and issued appropriate title insurance policies to Virginia Corporation and to the Bank.

By reason of the foregoing, appellants allege injury. The gravamen of appellants' claim against the Title

Company is that by undertaking escrow duties, the Title Company had an obligation to advise appellants of all facts within its knowledge which may have affected the seller's bargaining position vis-a-vis the purchaser. Specifically, appellants allege that by failing to inform appellants of the $2,700,000.00 mortgage loan which the Virginia Corporation procured from the Bank, the Title Company breached its fiduciary duty of disclosure to appellants. Against Piluso, as agent of the Virginia Corporation and the Pomponios, Murray alleges fraud and diversion of corporate funds. A discussion of each of these contentions is contained herein.

I.

The initial contention of appellants is based on the fallacious premise that an escrow agent has a duty to voluntarily advise a buyer or seller of real estate of facts within his knowledge that may affect the relative bargaining positions of the principals. As a general rule, the duties of an escrow agent are limited to the terms of the escrow agreement, or specified escrow instructions. An escrow holder is not under a fiduciary duty to go beyond the escrow instructions and notify each party to the escrow of any suspicious fact or circumstance that may come to his attention.[3] The authority of an escrow agent is to be strictly construed, and where an escrow agent departs from that which is given in terms or is necessary and proper to carry the authority given into full effect, he is liable for departure therefrom.[4] Thus, where, as here, an escrow agent

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[3] 28 AM. JUR. 2d, *Escrow* § 16 (1966 Ed., 1977 Supp.).

[4] 30A C.J.S. *Escrow* § 8 (1965).

carries out its escrow instructions, as set forth in the settlement sheet, it has fulfilled all of its escrow duties.

The instructions to appellee Title Company were very sparse. The Title Company was to record the deed from Murray to the Virginia Corporation and, immediately thereafter, record the deed of trust from Virginia Corporation in favor of the Bank. Once the Bank was notified that the deed of trust was on record, the Bank was to wire $750,000.00 to the Title Company's escrow account. The Title Company was to then disburse the $750,000.00 to Murray to provide the downpayment on the sale, and issue title insurance policies to the Virginia Corporation and to the Bank. This was the extent of the Title Company's escrow duties. The Title Company duly executed each of these duties.

Appellants allege that the Title Company had a duty to inform them of the details of the Royal Bank loan and that because they failed to do so, appellants sustained damage at least in the amount of $1,950,000, the difference between the $750,000.00 downpayment Murray received, and the $2,700,000.00 loan. Appellants proffer that if Murray had known of the nature of the loan, he would not have agreed to accept such a meager downpayment.

From the instructions given to the Title Company, this court cannot find that the Company had an obligation to disclose to the appellant any information about the Royal Bank loan. Such an obligation is neither expressly contained in the escrow instructions, nor can the same be deemed necessary and proper to carry the authority given into full effect.

Concluding, as this court has, that the Title Company breached no escrow duty owed to the appellants, the trial court granted appellees' motion for summary judgment.

This motion was granted after extensive pretrial discovery in which the trial court reviewed the pleadings, affidavits, and admissions on file. From the documents before it, the trial court found the facts as above stated. Finding no genuine issue as to a material fact, and that the appellee was entitled to judgment as a matter of law, the trial court granted appellee's motion.

This court's function on the appeal of a grant of summary judgment is to determine whether any material factual issue exists. Super. Ct. Civ. R. 56(c); *Bennett v. Kiggins,* D.C. App., 377 A.2d 57, 59 (1977). We must view the record in the light most favorable to the opposing party. *Id.; Adickes v. Kress and Co.,* 398 U.S. 144 (1970). Having reviewed the pleadings, affidavits and other material contained in the record, this court is assured not only that no issue of material fact existed, but also that the prevailing party was legally entitled to the judgment. *Turner v. American Motors General Corporation,* D.C. App., 392 A.2d 1005, 1006 (1978) (and cases cited therein).

II.

The second contention presented is that the trial court committed error by dismissing the complaint against appellee Piluso at the close of appellants' case in chief.[5]

Appellants' complaint against Piluso charged fraud and diversion of corporate assets. With respect to the fraud alleged, Murray proffers that in negotiating settlement,

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[5] Super. Ct. Civ. R. 41(b) provides for involuntary dismissal of an action tried by the court without a jury, if, upon motion of the defendant, the trial court finds, at the close of plaintiff's case in chief, that upon the facts and the law the plaintiff has shown no right to relief.

Piluso made two material misrepresentations which the appellants relied on to their detriment. First, it is alleged that Royal National Bank would not allow junior liens on the property it was financing. Secondly, it is alleged that appellee Piluso falsely represented that the Virginia Corporation was going to finance the downpayment from its own resources. These representations, appellant would have this court conclude, constituted material misrepresentations which they relied on to their detriment.

In business transactions, one who fraudulently makes a misrepresentation of fact with the intent of inducing another to act or refrain from acting in reliance thereon, is liable to the other for harm caused to him by the other's justifiable reliance on the misrepresentation. To establish a claim for a fraudulent misrepresentation, the plaintiff must prove by clear and convincing evidence, *Bennett v. Kiggins, supra,* that (1) a false representation was made; (2) in reference to a material fact; (3) with knowledge of its falsity; (4) and intent to deceive; and that (5) action or inaction of plaintiff was in reliance upon a representation. *See United States v. Kiefer,* 97 U.S. App. D.C. 101, 102, 228 F.2d 448 (1955), *cert. denied,* 350 U.S. 933, *rehearing denied,* 350 U.S. 977 (1956); *Pence v. United States,* 316 U.S. 332 (1942). Nondisclosure or silence, as well as active misrepresentation, may constitute fraud. *Bennett v. Kiggins, supra,* at 50. One pleading fraud must allege facts which reveal the existence of the requisite elements of fraud and enable the court to draw an inference of fraud. *Id.* at 60. Conclusions on the part of the pleader as to the existence of fraud are insufficient. *Bennett* at 60. It is not necessary, however, that the elements of fraud be proven by direct evidence. It may be established by reasonable inferences deducible from circumstantial evidence.

Applying the above standards to the record, we cannot conclude that the trial court erred in dismissing appellants' case at the close of the evidence. The evidence presented at trial disclosed that the first alleged false representation, that Royal National Bank would not allow junior liens on the property it was financing, was in fact, a true statement. As to the second alleged false representation, that the Virginia Corporation was going to finance the downpayment from its own resources, the trial court found that while the Pomponios and Piluso did represent that the downpayment had to come from their own resources, appellants' failed to introduce any evidence of the materiality of this representation or any evidence of the materiality of this representation or any evidence that appellants relied on the representation. The court, thus, concluded that the appellants failed to sustain their burden of proof of fraud and entered judgment for the appellee on the count of fraud. We cannot conclude that the court's finding with regard to the alleged fraud was plainly wrong or without evidence to support it. D.C. Code 1973, § 17-305(a). Therefore it is affirmed.

Appellants' final contention is that the trial court erred by dismissing the count of the complaint charging Piluso with unlawful diversion of corporate funds. We find this argument to also be unfounded.

The evidence adduced established that Piluso was an officer of the Virginia Corporation, assistant secretary, not a director, and that as such, Piluso had no authority to sign or issue checks drawn on the Virginia Corporation. Evidence further established that four checks issued by the Virginia Corporation, totaling $2,950.00, were made payable to Piluso. However, there was no showing that these funds were not legitimate corporate expendi-

tures. While it was shown that substantial quantities of money were paid out of the Virginia Corporation's checking account to other Pomponio corporations, there was no evidence introduced that these disbursements were for the personal benefit of Piluso. Finally, appellants failed to introduce evidence that Piluso caused the issuance of any of the checks which were allegedly diverted by the Virginia Corporation.

On the above findings, the trial court concluded that the evidence failed to establish that Piluso unlawfully diverted corporate funds. After a complete review of the whole record, this court is satisfied that the trial court's finding was not plainly wrong or without evidence to support it. D.C. Code 1973, § 17-305(a). Accordingly, we affirm.

Per Curiam.

For the Court:

/s/ Alexander L. Stevas
Clerk

Copies to:

Honorable DeWitt S. Hyde

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APPENDIX B

DISTRICT OF COLUMBIA COURT OF APPEALS

Nos. 14084, 14197

[Filed: Feb. 27, 1980]

JEROME S. MURRAY, *et al.*,
Appellants,

v.

ALEXANDER TITLE AGENCY, INC., *et al.*,
Appellees.

ROYAL NATIONAL BANK, *et al.*,
Appellees.

BEFORE: Newman, Chief Judge, Kelly, Kern, Gallagher, Nebeker,* Harris,* Mack, Ferren and Pryor,* Associate Judges.

ORDER

On consideration of appellants' petition for rehearing *en banc,* it is

ORDERED that the petition is hereby denied.

Per curiam.

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APPENDIX C

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA—CIVIL RULES

RULE 16

PRE-TRIAL PROCEDURE; FORMULATING ISSUES

In any action, the court may in its discretion direct the attorneys for the parties to appear before it for a conference to consider

(1) The simplification of the issues;

(2) The necessity or desirability of amendments to the pleadings;

(3) The possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof;

(4) The limitation of the number of expert witnesses;

(5) The advisability of a preliminary reference of issues to a master for findings to be used as evidence when the trial is to be by jury;

(6) Such other matters as may aid in the disposition of the action.

The court shall make an order which recites the action taken at the conference, the amendments allowed to the pleadings, and the agreements made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions or agreements of counsel; and such order when entered controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice.

* * *